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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1191

JAMES W. KERR, JR.,
Petitioner,
vs.
EL PASO TIMES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

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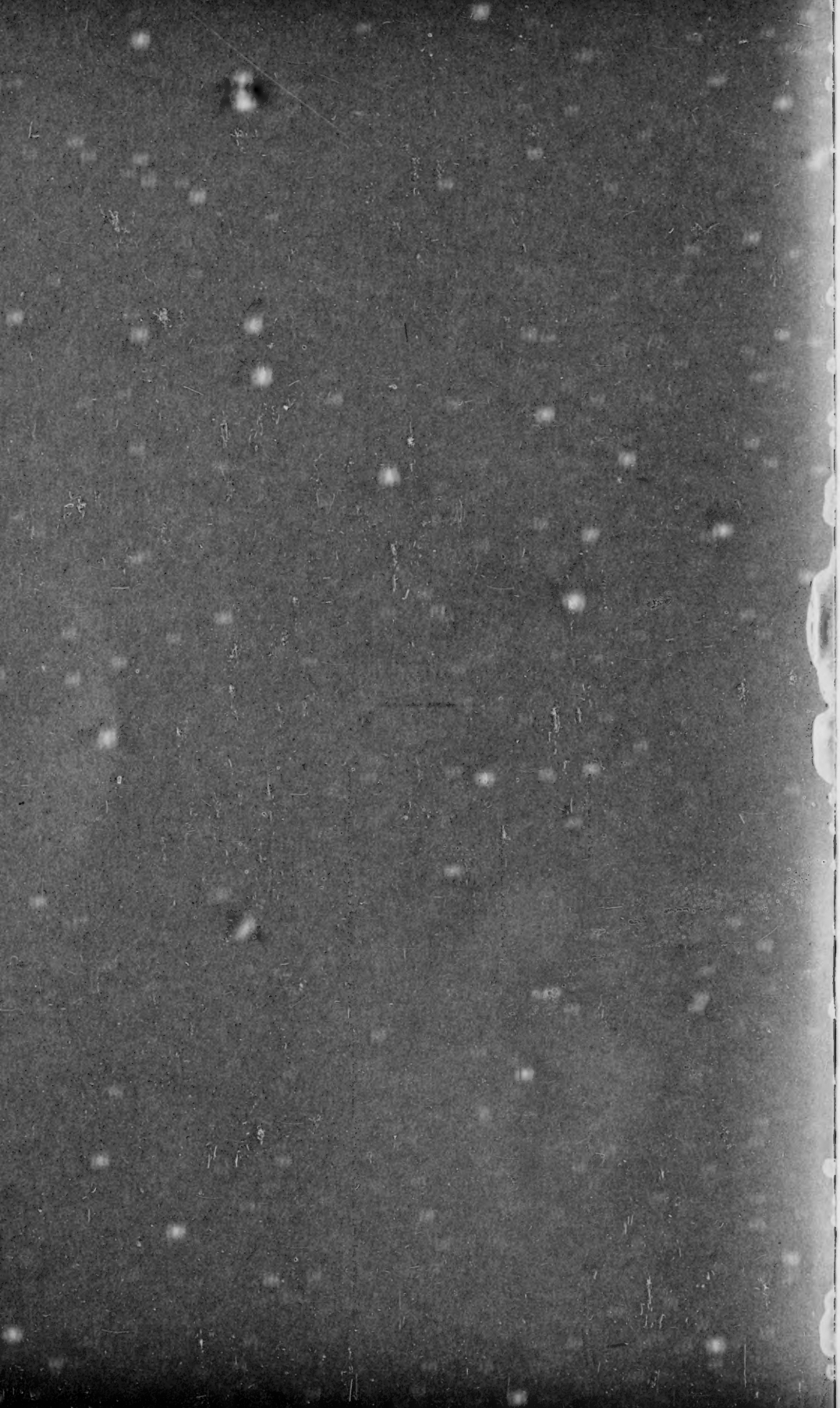

QUESTIONS PRESENTED

Whether a column published in a newspaper's "Opinion/Commentary" section was constitutionally protected both as opinion and as not published with actual malice; and whether Texas law required judgment for Respondent.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF THE CASE

Petitioner's recitation of the facts is misleading and incomplete, requiring a full restatement. The Petition creates two important inferences not supported by the record: (1) That the jury's verdict found a so called " 'cheating' statement" to have been false, defamatory and maliciously published; and (2) that the Court of Appeals found the evidence of actual malice sufficient and thus was required to determine whether this "cheating statement" was opinion or fact. In fact, as will be seen: (1) The trial court's Special Issue inquired whether the entire article, not an isolated phrase or statement, falsely accused Petitioner of cheating; and (2) the Court of Appeals

sustained Respondent's first two points of error and never reached those points concerning the evidence of actual malice.[1]

1. Facts

In its Sunday "Opinion/Commentary" section of August 6, 1978, *The El Paso Times (The Times)* published a column authored by one of its reporters, Ronald Dusek (Dusek), entitled "Federal System Less Than Just?". *The Times'* format additionally labeled it as opinion since Dusek's photograph appeared with the column; something allowed by the paper only with editorial, commentary columns. It was an opinion piece, based upon his observations while covering the federal courthouse, in which Dusek expressed his concerns about the fairness of the federal justice system as administered in El Paso, Texas. The trial of *United States of America v. Rick de la Torre and Ben Garcia,* a drug conspiracy case, had just concluded on the preceding Thursday; Dusek had covered the entire trial, reporting on it daily in the news columns of *The Times.* Petitioner, James W. Kerr (Kerr), was the prosecuting Assistant United States Attorney in the *de la Torre* case and part of the column reflected Dusek's observations and criticisms of Petitioner's handling of that prosecution.

Kerr's trial pleading, his Fourth Amended Original Petition, alleged two counts: that he had been libeled by the specific statement, "Kerr lied", and that the column as a whole accused him of "cheating in the performance of his public duties". *The Times* answered that the column was a constitutionally protected expression of opinion and not actionable, that it did not accuse Kerr of cheating, and that, in any event, it was not published with actual malice. The trial court held Kerr to be a public official under *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686 (1964), and submitted the issue of actual malice to the jury.

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[1] Respondent urged nineteen separate points of error in the Court of Appeals: the article was privileged opinion (Points 1 and 2), not maliciously published (Points 3 and 4), the damage verdict was unsupported by the evidence (Points 5 through 13, 16 & 17), the damage instruction was constitutionally defective as permitting recovery for protected speech (Points 14 & 15) and errors in the court's charge (Points 18 & 19).

Both claimed libels were submitted to the jury which found that the statement "Kerr lied" was not published with actual malice, but that the column's alleged accusation of cheating was false, defamatory and maliciously published. The jury awarded Petitioner $500,000.00 in "actual" damages and $3,000,000.00 in exemplary damages. On January 11, 1985, the trial court entered its Order Granting New Trial Subject to Petitioner's Filing of Remittitur, requiring a reduction to $100,000.00 in "actual" damages and $500,000.00 in exemplary damages, which Kerr accepted on January 18, 1985.

The Times appealed from the $600,000.00 judgment to the Court of Appeals for the Eight District of Texas which sustained the first two points of error and rendered judgment for *The Times,* holding that the publication was a constitutionally protected expression of opinion. The Court of Appeals did not reach *The Times'* remaining seventeen points of error relating to actual malice, damages and error in the charge. The Texas Supreme Court refused to grant a writ of error finding no reversible error.

As previously stated, *The Times* published Dusek's column in the "Opinion/Commentary" section of its Sunday, August 6, 1978 edition. In general, the column expressed Dusek's concern about the fairness of the administration of federal criminal justice in El Paso; it was based upon his observation of several federal criminal trials and was published three days after Kerr's successful prosecution of the locally controversial *de la Torre* drug conspiracy case. The column alluded to a number of instances not involving Kerr which Dusek had observed while covering the federal courthouse for *The Times.* These incidents, including prior federal prosecutions, had caused him to question the fairness of the federal judicial system in El Paso. Dusek testified as to the facts supporting each paragraph in the column.[2]

The prior events recited by Dusek should have concerned any citizen and were certainly open to comment and criticism. He cited an incident in which an alien was attempting to run

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[2] The entire column is reproduced as Appendix A with each paragraph separately numbered; Appendix B lists references to those portions of the record supporting the statements in each paragraph.

back across the river into Mexico and was shot by a border patrol agent; the fleeing alien was charged with assault notwithstanding he had not touched the agent before he was shot. The El Paso Border Patrol Chief had publicly admitted that the illegal alien was charged with assault in order to prevent a civil suit against the agent.

In a second case two youths were fleeing from an unmarked undercover border patrol van believing that they were being chased by the boy friends of some females they had been teasing; they too were shot at and arrested. In another, a DEA informant on trial for possession of heroin had claimed that the DEA had asked him to penetrate a smuggling ring; he did, but was unable to get out prior to the DEA "bust" and was arrested and charged along with the other defendants. When the informant was tried, his defense attorney requested that the word "coercion" be added to the court's charge and that the word "entrapment" be better defined; the court refused this request saying that it "was too late." Dusek had covered all of these trials as a reporter for *The Times* and had witnessed and reported the events he criticized in the column.

On Monday, July 31, 1978, in a trial presided over by Judge John H. Wood, Jr., the United States began its prosecution of Rick de la Torre and Ben Garcia on criminal charges of conspiracy with intent to import and distribute cocaine and marijuana.

Some weeks prior to the trial the government had produced a list with the alleged conspirators' code-names on it; then, a day and a half before trial the prosecution produced a second list which for the first time included the defendants' names.

Richard Gross, a paid informer and government undercover agent, was the first witness. Gross testified that de la Torre, on several past occasions, had supplied the money for expenses involved in drug smuggling efforts. Gross also claimed that de la Torre had told him that "... this would make up for some of the losses that he [de la Torre] had had in the past...."

When de la Torre testified, however, he denied that he had ever been a member of the alleged conspiracy, that he had at any time represented himself as the financial backer of the group, and that he had ever told Gross that he needed this smuggling transaction to go well to make up for other drug losses.

Kerr concedes de la Torre never admitted during the trial that he had a financial involvement in any drug smuggling or other criminal conspiracy of any sort. Nevertheless, during his summation or Thursday, August 3, 1978, Kerr argued to the jury:

> We have Mr. de la Torre admitting during the course of the conspiracy that he had a financial involvement in the 17,000 pounds of marijuana that was lost in Ardmore and that he now needed this case to be successful, to make up for these past criminal business losses.

A moment later he argued:

> And who is the person who was distributing the money? Who was the person who was representing these financial backers? It was the pillar of the community. It was Mr. Rick de la Torre. By his own admission he had a financial involvment. He was representing the financial backers.

In his final argument, de la Torre's defense attorney, Lee Chagra, responded:

> And to ask you as human beings to convict these people—he says Mr. de la Torre admitted that he was a financial backer. I didn't hear him admit it. Mr. Gross said he admitted it. Mr. Gross said he admitted it on the 15th. Mr. Gross is a liar. And there is no gentle way to put it.

The jury convicted de la Torre and Garcia on only one of the four counts of the indictment.

Dusek covered the entire trial and was personally present at all proceedings, including the final argument. He had

factually and accurately reported on the events that occurred at the trial on a daily basis in *The Times.* Kerr makes no complaint regarding these news articles or their accuracy. The guilty verdict was returned on Thursday, August 3, which, Dusek believed, was the deadline for his column if it was to appear in Sunday's "Opinion/Commentary" section.

Dusek repeatedly testified to his firm belief that Kerr had lied in his argument in an attempt to mislead the jury, and that the government had failed to produce the second code-name list in sufficient time prior to trial. He did not believe these actions were "fair". With regard to the article's only reference to cheating, Dusek testified that the statement, "The burden is no excuse for cheating", was a general statement referring to the entire column. Significantly, the Court of Appeals held that "A fair reading of the article as a whole leads to that conclusion as well." *El Paso Times, Inc. v. Kerr,* 706 S.W.2d 797 (Tex. App.—El Paso 1986, writ ref'd n.r.e.).

Dusek recalled that there had been testimony and controversy in the *de la Torre* trial regarding the two conflicting code-name lists and that the second list reflected that the code-names for the names of de la Torre and Garcia had been added at an unknown subsequent date by an unknown person. The first code-name list did not include the names of de la Torre or Garcia. His memory of the controversy is borne out by the transcript of the *de la Torre* trial. Dusek testified without rebuttal by Kerr that attorney Chagra had, in fact, complained to Dusek that a day and a half was not enough time for him to have the handwriting on the second list analyzed to determine its origin and authenticity.

Dusek was not a lawyer and had no legal training. He began covering the El Paso federal courthouse in early 1977, and had never before covered the criminal or civil justice system, state or federal. He testified that at the time of publication he did not know the difference between a judicial admission and an admission against interest, and had no knowledge or experience with law, criminal procedure or the Federal Rules of Evidence regarding admissions.

Kerr produced no evidence that he suffered any harm to his reputation, either past or future. He failed to produce a

single witness who thought less of him after the publication or claimed that it had any effect on Kerr or their perception of him. Kerr himself was unable to testify that the article had adversely affected his reputation or career in any way whatsoever. The lack of injury to Kerr's reputation is best reflected by his continuing successful and ever advancing career in the federal government and his ability to work at the same level of success and achievement after as before publication. Kerr stipulated that he suffered no pecuniary loss or damage as a result of the article and admitted that it was an unsuccessful assassination attempt of November 21, 1978 that drastically altered his life-style and profession, not Respondent's August 6 publication.[3] He testified that his income has increased steadily since publication and that he has always been rated as either an "outstanding" or "satisfactory" federal employee, entitling him to all available promotions and pay raises. He received two high honors following publication: the Attorney General's Medal and Senator Tower's recommendation for nomination as judge of the U.S. District Court for the District of Columbia, admittedly one of the nation's most prestigious federal trial benches. Kerr's current position as a federal Administrative Law Judge is one so desirable that he had sought it long prior to August 6, 1978 and the assassination attempt.

In short, Kerr was unable to point to a single facet of his life that was affected or changed in any way by the *The Times'* publication. He was unable to produce any evidence that he had suffered any physical harm or strain, and did not offer any evidence that he had suffered any physical or mental harm. He claimed no lost sleep, not even a single headache or other physical side-effect. Instead, Petitioner simply testified, in a conclusory and self-serving manner, that he was "embarrassed", "humiliated", "shocked", "disappointed", and "hurt" by the publication and that he simply "couldn't believe it". He

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[3] Kerr was the target of an assassination attempt in San Antonio in November, 1978; that attempt preceded by a few months the murder of United States District Court Judge, John H. Wood, Jr. Petitioner originally claimed that *The Times'* news reports and the column at issue had precipitated the assassination attempt, for which he sought damages. Kerr, however, dropped this claim shortly prior to trial and finally agreed at trial that he could not, in good faith, claim that the August 6 column or *The Times* had caused the attempt on his life.

testified that the article still "bothers him" and "disturbs him" because the record has "not yet been set straight."

2. The "Cheating" Verdict

Petitioner suggests at page 5 of his Petition that the "... article contained Dusek's accusations that 'Kerr lied' and 'cheat[ed]' in his prosecution of the *de la Torre* trial." This "accusation of 'cheating' ", he states at page 6, was found by the jury to have been false, defamatory and maliciously published. Then, most significantly, he suggests, at pages 8 and 9, that the Court of Appeals approved the verdict as to actual malice and, thus, "... had to decide whether the statement was an assertion of fact or opinion in order to determine if the 'cheating' statement was also protected speech under the Constitution." The Court of Appeals incorrectly stated that the jury found "[t]he 'cheating' phrase falsely accused Appellee of cheating...." *Kerr,* 706 S.W.2d at 797.

In fact, Special Issue No. 3 inquired whether "... *the article of August 6, 1978* falsely accused Plaintiff... of cheating...". (emphasis added). No issue making inquiry as to any specific language or phrase within the article was requested or submitted.[4] In the courts below, Respondent urged error in the manner in which the trial court had charged the jury: the charge impermissibly assumed the article accused Petitioner of cheating, a controverted fact issue; and failed to inquire whether the ordinary reader would have so interpreted the article, a fact essential to Plaintiff's recovery under Texas law. Indeed, the Court of Appeals was aware of the problem with the court's charge and Respondent's points on that issue as is evidenced at page 798 of its opinion wherein it recognized that there was "controversy" as to whether the article made the

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[4] If Petitioner sought a finding that the "no excuse for cheating" phrase was false, defamatory and published with actual malice, under Texas law the issues should have been framed with the specific language as was done in Special Issue No. 1 rather than inquire as to the article as a whole. *See Houston Printing Co. v. Hunter,* 105 S.W.2d 312 (Tex. Civ. App.—Fort Worth), *aff'd per curiam,* 106 S.W.2d 1043 (Tex. 1937); *Times Pub. Co. v. Ray,* 1 S.W.2d 471 (Tex. Civ. App.—Eastland 1927), *aff'd,* 12 S.W.2d 165 (Tex. Comm'n App. 1929, opinion adopted); *Fitzjarrald v. Panhandle Publishing Co.,* 228 S.W.2d 499 (Tex. 1950).

claimed accusation. That court, however, assumed for discussion purposes that the accusation had been made. *Kerr,* 706 S.W.2d at 798.

In *dictum,* the Court of Appeals stated erroneously that Dusek, when challenged, failed to provide evidence Kerr had cheated in connection with the code-name lists. *Kerr,* 706 S.W.2d at 799. The Court misinterpreted Dusek's testimony. In fact, he testified that he believed the instances cited in his column were unfair, including Kerr's handling of the code-name lists. Dusek testified that the statement "The burden is no excuse for cheating" was a general statement, referring to the entire story, including his belief that Kerr had lied in his closing argument, that Kerr's handling of the two code-name lists was not fair and the other criticized incidents not involving Kerr. He testified that there was testimony and controversy in the *de la Torre* trial regarding the two conflicting code-name lists, and that the evidence reflected that the code-names for de la Torre and Garcia had been added to the second list. His memory of the controversy was confirmed by the transcript of the criminal trial admitted into evidence. Dusek testified without rebuttal that de la Torre's attorney, Lee Chagra, had, in fact, complained to Dusek that a day and a half was not enough time for him to have the handwriting on the second list analyzed to determine its origin and authenticity. Dusek firmly believed in the truth and accuracy of his opinions both at the time he wrote and at the time of trial. He formed his opinions by being present for the entire *de la Torre* trial and by his personal knowledge gained by covering the various other events commented on in his column.

SUMMARY OF THE ARGUMENT

The Times submits that by reason of its content, format, location and subject "Federal System Less Than Just?" is a constitutionally protected expression of opinion and is not actionable. Further, Dusek held an honest belief in the accuracy and truth of his column, and there is no clear and convincing evidence that any reference to cheating was published with actual malice. The evidence does not support the award of actual and exemplary damages since Kerr was not injured by the statements in question. Under Texas law, the

column, if libelous, was, at most, libelous *per quod* and judgment was required for Respondent since there was no proof of injury to Petitioner's reputation.

ARGUMENT

1. The Column Was Protected Opinion

Published as a column in the "Opinion/Commentary" section of the paper, labeled as opinion both by its format and content, laced with cautionary words and the author's perceptions and impressions, and accurately disclosing its supporting facts, "Federal System Less Than Just?" was protected opinion.

The phrase Petitioner seizes upon is itself so clearly opinion as to hardly merit discussion:

> "In every case, the prosecution sounds off about its burden to prove guilt. The burden is no excuse for cheating."

Is this not simply another way of arguing that "the end is not justified by the means"—a point endlessly debated in every conceivable context.

Regardless of whether a new or existing "test" is applied to the column, it is patently protected opinion. *See Greenbelt Cooperative Publishing Ass'n. v. Bresler,* 398 U.S. 6, 26 L.Ed.2d 789 (1974); *Old Dominion Branch No. 496, National Ass'n. of Letter Carriers v. Austin,* 418 U.S. 264, 41 L.Ed.2d 745 (1974); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 41 L.Ed.2d 789 (1974); *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 80 L.Ed.2d 502 (1984); *Ollman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984); *Lauderback v. American Broadcasting Companies, Inc.,* 741 F.2d 193 (8th Cir. 1984), *cert. denied,* ____ U.S. ____, 83 L.Ed.2d 967 (1985); *Janklow v. Newsweek,* 788 F.2d 1300 (8th Cir. 1986); *Lewis v. Time, Inc.,* 710 F.2d 549, 553 (9th Cir. 1983); *Rinsley v. Brandt,* 700 F.2d 1304, 1309 (10th Cir. 1983); *Mr. Chow of New York v. Ste. Jour Azur S.A.* 759 F.2d 219 (2d Cir. 1985); *Rinaldi v. Holt, Reinhart & Winston, Inc.,* 42 N.Y.2d 369, 366 N.E.2d 1299

(1977), *cert. denied,* 434 U.S. 969, 54 L.Ed.2d 456; *Hawkins v. Oden,* 459 A.2d 481 (R.I. 1983); *Church of Scientology v. Cazares,* 638 F.2d 1272 (5th Cir. 1981); *Information Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781 (9th Cir. 1980); and *see* RESTATEMENT (SECOND) OF TORTS § 566, comment § 614.

The courts have articulated several analyses to distinguish protected expressions of opinion from actionable statements of fact. In substance, the cases agree the court should consider the totality of the circumstances surrounding the publication to determine whether the average, ordinary reader would view it as fact or opinion. In examining the circumstances, the courts typically look at the common meaning and usage of the specific language complained of, whether the statement is capable of objective characterization as true or false, whether the language as a whole reflects that it is opinion, and, finally, the overall setting in which the article appeared.[5]

Under the above authorities "Federal System Less Than Just?" qualifies as constitutionally protected opinion. The only language in the column that has any reference to cheating is polemical and subjective:

> "In every case, the prosecution sounds off about its burden to prove guilt. The burden is no excuse for cheating."

By itself the statement cannot possibly be construed as a factual assertion that Petitioner cheated in connection with the lists or otherwise.

Second, the quoted statement is not capable of being objectively characterized as true or false. The column reflects Dusek's perceptions of Petitioner's state of mind or intention, neither of which is not objectively verifiable. Third, the column's language as a whole reflects that it is opinion, and the reader is constantly reminded of its nature. The column

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[5] The Restatement and some early, state authorities distinguished between "pure" and "mixed" opinion, protecting the former due to the disclosure of the facts giving rise to the opinion. That analysis is unnecessary and inappropriate here in light of the Court of Appeals' finding that ". . . Mr. Dusek gave the facts upon which he based the article." See *Kerr,* 706 S.W.2d at 800.

immediately identifies itself as opinion both by its title and the cautionary words which appear throughout.

Finally, it was published in *The Times* in an opinion setting—the "Opinion/Commentary" section. The column ran with Dusek's picture which was done, in *The Times,* only with opinion columns. Thus, by reason of its location, format and content, the column must be considered opinion under any standard.

2. The Record Does Not Contain Clear and Convincing Evidence of Publication With Actual Malice

As a public official, Kerr was required to prove actual malice by clear and convincing evidence.[6] *New York Times Co. v. Sullivan, supra; St. Amant v. Thompson,* 390 U.S. 727, 20 L.Ed.2d 262 (1968). *See also Gertz v. Robert Welch, Inc., supra; Foster v. Upchurch,* 624 S.W.2d 564 (Tex. 1981); *A. H. Belo Corp. v. Rayzor,* 644 S.W.2d 71, 84-85 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e).

Thus, the inquiry of whether *The Times* published with actual malice focuses on *The Times'* state of mind at the time of publication; it is, under both federal and Texas law, necessarily a subjective rather than an objective test. *Foster v. Upchurch,* 624 S.W.2d at 566; *El Paso Times, Inc., v. Trexler,* 447 S.W.2d 403 (Tex. 1969); *Dun & Bradstreet, Inc. v. O'Neil,* 456 S.W.2d 896 (Tex. 1970); *Doubleday & Co., Inc. v. Rogers,* 674 S.W.2d 751, 756 (Tex. 1984); *Sherman v. Times Herald Printing Co.,* 671 S.W.2d 700, 703 (Tex. App.—El Paso 1984, no writ); *Holly v. Cannady,* 669 S.W.2d 381, 384 (Tex. App.—Dallas 1984, no writ).

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[6] The trial court correctly defined clear and convincing evidence as " . . . that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the existence of actual malice, as that term has been defined. Proof by 'clear and convincing evidence' is greater than the 'preponderance of the evidence' standard of ordinary civil cases and which you will follow in connection with other issues in this charge. Proof by 'clear and convincing evidence' requires proof which is strong, positive, precise, unmistakable and free from serious or substantial doubt, although it is not necessary that the evidence be completely unequivocal or undisputed."

The Court must bear in mind that the jury found the statement "Kerr lied" not to have been maliciously published. Secondly, Special Issues 3 through 5 were directed to the entire column rather than a particular phrase. Therefore, the question is whether there is clear and convincing evidence that the entire column, insofar as it allegedly implied Kerr cheated, was published with actual malice.

The uncontroverted evidence was that Dusek firmly believed in the validity and accruacy of opinions expressed both at the time he wrote and at the time of trial. His opinions were formed during the *de la Torre* trial and by personal knowledge gained covering the various events and matters commented on in his column. Most significantly, as the attached Appendix B reflects, every statement of fact in the article was supported by competent, corroborating evidence.

There was no evidence of animosity between Dusek and Kerr nor any suggestion of an intent to harm. At best, the record could support an argument that Dusek misinterpreted Kerr's summation and conduct.

If Dusek, in fact, misinterpreted the actions of Kerr and misunderstood the legal rules and implications, his misunderstanding would not be sufficient evidence of actual malice. Any argument to the contrary has been foreclosed by *Time, Inc. v. Pape,* 401 U.S. 279, 28 L.Ed.2d 45 (1971). Pape sued *Time* magazine claiming that he had been libeled by *Time's* reporting of allegations of police brutality as if they were fact. In sustaining the trial court's summary judgment for *Time* and reversing the Circuit Court, this Court said:

> Time's omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under New York Times. 401 U.S. at 290, 28 L.Ed.2d at 53.

Reviewing the policy considerations which supported the decision in *New York Times Co. v. Sullivan,* the Court continued:

> . . . These considerations apply with even greater force to the situation where the alleged libel consists in the claimed misinterpretation of the gist of a lengthy government document. Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided disrection of a jury.
>
> In certain areas of the law of defamation, New York Times added to the tort law of the individual States a constitutional zone of protection for errors of fact caused by negligence. The publisher who maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is thereby given assurance that those errors that nonetheless occur will not lay him open to an indeterminable financial liability. This protection would not exist for errors of interpretation were the analysis of the Court of Appeals to be adopted, for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff." 401 U.S. at 291, 28 L.Ed.2d at 54.

The courts have followed the lead of *Time, Inc. v. Pape* and have been particularly protective of speech which involves the interpretation of the acts and deeds of public officials. *See Orr v. Argus-Press Co.,* 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960, 59 L.Ed.2d 773 (1979); *Ryan v. Brooks,* 634 F.2d 726 (4th Cir. 1980); *Glover v. Herald Co.,* 549 S.W.2d 858 (Mo. 1977), *cert. denied,* 434 U.S. 965, 54 L.Ed.2d 451; *Bandelin v. Pietsch,* 563 P.2d 395 (Idaho 1977), *cert. denied,* 434 U.S. 891, 54 L.Ed.2d 177.

The applicability of these cases is obvious. If one of several rational interpretations of an ambiguous document cannot, as a matter of law, be evidence of actual malice, how can one of several possible interpretations of clearly ambiguous jury argument and conduct at trial be different?

Kerr's argument on the point at issue was obviously ambiguous.

> We have Mr. de la Torre admitting during the course of the conspiracy that he had a financial involvement in the 17,000 pounds of marijuana that was lost in Ardmore and that he now needed this case to be successful, to make up for these past criminal business losses."
>
> * * *
>
> And who is the person who was distributing the money? Who was the person who was representing these financial backers? It was the pillar of the community. It was Mr. Rick de la Torre. By his own admission he had a financial involvement. He was representing the financial backers. (Px. 5, p. 1095; Dx. 24).

It is arguable that one could believe that he meant that de la Torre had admitted during the trial that he was the so-called "moneyman" of the organization or, on the other hand, that he meant that he had made that admission to Gross prior to trial—or both.

Dusek's interpretation is clearly reasonable—it was shared by defense counsel Chagra who told the jury:

> . . . He says Mr. de la Torre admitted that he was a financial backer. I didn't hear him admit it. Mr. Gross said he admitted it.

Dusek's good faith in choosing the former interpretation was not shaken; on the contrary, he steadfastly maintained that he honestly and sincerely believed that Kerr was intentionally misleading the jury. Similarly, de la Torre's counsel had complained of Kerr's late production of the second code-name list.

There is no conclusive way of learning whether Kerr intended to mislead the jury or to otherwise unfairly gain an advantage in the trial. It is self-apparent that Dusek had no fail-safe way of knowing Kerr's state of mind. Fortunately, the Constitution permits free men to draw and voice unpleasant

and even harsh, though possibly mistaken, conclusions about public officials, including those prosecuting drug conspiracies.

Even if Dusek's interpretation was admittedly mistaken, that would not be enough. The Texas Supreme Court, relying on *Pape*, has held that it is not enough for a plaintiff to show that the defendant made a mistake; actual malice is much more than an error in judgment. *Foster v. Upchurch,* 624 S.W.2d at 566.

The record in this case establishes as a matter of law that Dusek not only believed in the truth of his column, but had more than reasonable grounds to do so. Every challenged statement is supported by facts. Dusek's belief that the government "boosted" its cases and that Kerr lied in his summation are reasonable and fully supported. Subjective awareness of probable falsity cannot be found where, as here, the article is supported by a multitude of previous reports and facts upon which the writer reasonably relied. *New York Times Co. v. Sullivan, supra; Rosanova v. Playboy Enterprises, Inc.,* 580 F.2d 859, 862 (5th Cir. 1978). Texas courts have recognized the same rule and enforced it in applying both the former common law standard of actual malice and the *Sullivan* test. *See El Paso Times, Inc. v. Trexler,* 447 S.W.2d 403, 406 (Tex. 1969); *Times-Mirror Co. v. Harden,* 628 S.W.2d 859 (Tex. App.—Eastland 1982, writ ref'd n.r.e.); *International & G.N.R. Co. v. Edmundson,* 222 S.W. 181 (Tex. Comm'n App. 1920, opinion approved); *Mayfield v. Gleichert,* 484 S.W.2d 619 (Tex. Civ. App.—Tyler 1972, no writ). The point is self-apparent since a reasonable belief in the truth of what was said is both logically and legally incompatible with a subjective awareness of falsity.

Given the unrebutted and fully supported testimony of Dusek that he believed the opinions he expressed and the accuracy of his column as a whole, Petitioner has failed to establish actual malice and judgment should be rendered for Respondent.

3. Texas Law Requires Judgment For Respondent

Kerr failed to meet his burden to prove that he suffered any "actual injury" to his reputation proximately caused by the

Respondent's publication. Since this is a libel *per quod* case [7] and Kerr failed to show any injury to his reputation, he is not entitled to any recovery from *The Times*. *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1984).

The evidence relating to the issue of injury to reputation and damages in general is summarized at pages 6-8 *supra*. Under both the United States Constitution and Texas law, this evidence is simply insufficient to establish compensable injury to reputation or mental anguish and fails to support the jury's award of actual and exemplary damages, even after remittitur.

The recent Texas cases of *A. H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.), and *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369, are dispositive of the issue. *Rayzor* is remarkably analogous to this case, and merits the Court's detailed review. In *Rayzor* the jury awarded the public-figure plaintiff $1,000,000.00 in actual damages and $1,000,000.00 in exemplary damages. The appellate court reversed and rendered holding:

> Appellee offered no substantial evidence, other than his own testimony, of any loss because of embarrassment or humiliation. He expressly admitted that he 'can't name anyone' who thinks less of him because of the articles. He offered no testimony that anyone had told him that he thought the article meant either that Rayzor had threatened to kill or physically harm Carter or Miller or that Rayzor had committed any crime . . . .

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[7] In Texas, publications concerning public officials are treated differently than publications about others in that even vigorous and untrue condemnation of an official is not libelous *per se* unless it charges an offense for which he may be removed from office. *Fitzjarrald v. Panhandle Publishing Co.*, 228 S.W.2d 499 (Tex. 1950); *Hearld-Post Publishing Co. v. Hervey*, 282 S.W.2d 410 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.); *Rawlins v. McKee*, 327 S.W.2d 633 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.). In any event, by submitting the question of whether the article was defamatory, the trial court correctly ruled the article, if libelous, to be only libelous *per quod* at best. *Cotulla v. Kerr*, 74 Tex. 89, 11 S.W. 1058 (1889); *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970). Petitioner failed to show that the alleged accusation of cheating would subject him to removal from his position as a United States Attorney, and under the above authorities this is at best a libel *per quod* case.

> Appellee offered no evidence of financial injury; his assets, which were impressive, increased steadily .... He admitted that he could not point to any actual dollar loss he had suffered because of the articles.
>
> Despite this state of the record, and this lack of proof of actual injury or loss, the jury awarded him $1,000,000 in 'compensatory' damages and $1,000,000 in exemplary damages. The jury was obviously motivated by something more than evidence in this case, because that was lacking. We believe, from the record as a whole, that this massive award of damages is the result of passion and prejudice against newspapers in general and this one in this case in particular. It cannot stand.
>
> * * *
>
> Rayzor offered no evidence of any emotional or physical reaction to the articles, except his self-serving claim that he was 'shocked and stunned' by the August 17, 1979 article. He never consulted either a physician or a professional psychologist or a counselor. Moreover, he offered no evidence of any actual injury to his reputation. In view of this evidence, or lack thereof, we hold that the award of $1,000,000 actual damages is unsupported by competent probative evidence and is beyond all reason. *Razor,* 644 S.W.2d at 85-86.

It is apparent that the plaintiff in *Rayzor* presented the same weak damage testimony as did Kerr and that such evidence is insufficient to support the jury's award of damages. As in *Rayzor,* Kerr failed to produce probative evidence of any actual or compensable injury sustained as a result of the publication. As in *Rayzor,* the jury's award of damages is not supported by probative evidence, and is obviously the result of impermissible "passion and prejudice against newspapers in general" and the *The Times* in particular.

Leyendecker & Associates, Inc. v. Wechter, supra, further establishes the inadequacy of Kerr's damage evidence. There, the Texas Supreme Court held that in cases of libel *per quod* a

plaintiff must prove injury to reputation before he can recover actual damages for mental anguish, etc. In *Leyendecker* an employee of the defendant wrote a letter falsely accusing plaintiffs of submitting fraudulent claims to an insurance company. The jury awarded Mrs. Wechter $1,500.00 in actual damages. The Court reversed the award holding that since the letter was only libelous *per quod,* the plaintiff's failure to prove injury to reputation or special damages as to Mrs. Wechter precluded the award of actual damages. The court stated:

> The only evidence of injury to Mrs. Wechter was the testimony of Mr. Wechter that his wife was "very much upset", "morose" and "depressed". We find that this evidence does not demonstrate injury to Mrs. Wechter's reputation. Therefore, we hold the court of appeals erred in awarding Mrs. Wechter damages for mental anguish from the letter." *Id.,* 683 S.W.2d at 374.

The evidence in *Leyendecker* is essentially identical to the present case. In both *Leyendecker* and the case at bar, the plaintiff proved only her/his state of mind and not the effect on reputation required by Texas law. In the absence of proof of injury to reputation, however, this testimony does not permit an award of damages since, under *Leyendecker,* there has been no proof of injury to reputation. Since Kerr offered no proof of injury to reputation or special damages, under *Leyendecker* judgment must be rendered for the Respondent.[8]

Even in the absence of *Leyendecker* and *Rayzor,* Petitioner's damage proof is inadequate to support any award. The Texas Courts have held defamation plaintiffs to the rigorous constitutional standard of damage proof. In *Ryder Truck Rentals, Inc. v. Latham,* 593 S.W.2d 334 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.), the Court held, relying primarily upon *Gertz* and *Foster v. Laredo Newspapers, Inc.,* 541 S.W.2d 809 (Tex. 1976), *cert. denied,* 429 U.S. 1123, 51 L.Ed.2d 573 (1977), that the jury could not award general or "presumed" damages and that all damage awards must be supported by

[8] During oral argument before the Court of Appeals, counsel for Petitioner admitted under questioning by the Court that there was *no* evidence in the record of injury to Kerr's reputation.

competent evidence. The *Ryder* and *Rayzor* courts held that in order to recover for mental anguish, plaintiff must show more than "mere worry, anxiety, vexation or anger"; rather, the proof must show "intense pain of body or mind, or a high degree of mental suffering". This showing, absent from *Rayzor* and *Ryder,* is obviously lacking in the instant case and those authorities govern.

CONCLUSION

WHEREFORE, Respondent prays that the Petition for Certiorari be denied and that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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By:_____
Richard Munzinger

By:_____
Bryan H. Hall

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing instrument was mailed to Jerry A. Gibson, Attorney for Petitioner, P.O. Box BH002, San Antonio, Texas 78201, this 18th day of February, 1987.

_____
Richard Munzinger

APPENDIX A

Federal System Less Than Just?

Ron Dusek

Times Staff Writer

(1) The federal trial of Rick de la Torre and Ben Garcia on drug conspiracy charges last week adds poundage to a premature but quickly developing opinion that the federal justice system in El Paso may be less than just.

(2) This opinion has nothing to do with the fact that de la Torre and Garcia were found guilty of one charge in a four-count indictment and innocent of the others.

(3) Controversy was rampant in the federal courthouse about whether the evidence was sufficient to show guilt and even about whether they should have been indicted in the first place. That no longer matters since the jury found them guilty.

(4) But, I'll go with the defense attorneys on their claim that the indictments were an afterthought by the government. They were indicted because all the other indictments (*sic*), charged in the original indictment ran off after being released on bail. The prosecution convicted one man, Fred Bella, and got reams of publicity, but had no one else to take to court after making all that noise about machine guns, nine tons of marijuana and some cocaine.

(5) When the defense attorneys expressed that idea, generally, in court, Assistant U.S. Attorney Jim Kerr protested to the jury in closing arguments with "Do you think the U.S. Attorney has nothing better to do? . . . No other criminals to prosecute?"

(6) Yes, Mr. Kerr, the U.S. Attorney has nothing better to do. There are no cases pending that will draw more publicity. About 98 percent of all criminal cases handled by the local feds are nonviolent crimes involving illegal aliens or pot smugglers. It is debatable whether or not those are

victimless crimes. Top government officials are arguing about whether to give aliens amnesty and to legalize pot. Heroin, bank robbery and murder are another subject.

(7) Kerr appears to have forgotten that U.S. Attorneys and their assistants are political appointees. Their future may depend on whether they can make the "big case" that will get lots of publicity. Political debts are paid by appointments to the U.S. Attorney's office—sometimes in complete disregard for the competency (*sic*) of the person appointed.

(8) There is one assistant U.S. Attorney in El Paso who has not, after nearly a year, handled a case in federal district court. That person has been given only menial tasks to perform and on occasion (*sic*) has not handled them professionally, resulting in obvious frustration for the judges and mocking comments by courthouse employees.

(9) Some courtroom actions in the past have suggested that judges, government attorneys and police are not above boosting their cases against defendants by less than admirable methods.

(10) For example, in two cases in which persons were shot by Border Patrol agents, the persons were charged with assault on the agents. In one of the cases, an alien was running across the river back to Mexico. He never touched the agent before he was shot. In the other case, two youths were running from an undercover Border Patrol van thinking they were being chased by the boyfriends of some of the female objects of their catcalls.

(11) Former local Border Patrol Chief Dale Swancutt admitted the persons were charged, hoping for a conviction, so that the agents could not be sued. In charging the jury, the judge said that fleeing from an agent can be considered assault. The charge was specific. The reasons for running were no defense. In both cases, it seemed as if the jury had no choice but to convict.

(12) Innocence or guilt can depend on the one word in the charges to the jury and whether the judge allows it.

(13) In another case recently, a Drug Enforcement Administration informant on trial for possession of Heroin claimed the DEA asked him to penetrate a smuggling ring. He did. Became part of a deal. Tipped off the DEA. They told him to get out. He didn't because he claimed in court it was too late. He was arrested when the DEA busted the deal.

(14) The defense attorney asked during the trial that the word "coercion" be added in charges to the jury as a defense. The word "entrapment" was already included, but the definition of entrapment didn't really fit what actually happened. The judge said the attorney's request was too late.

(15) The jury wasn't tacky about definitions, and found the man innocent. A man's life could have been crippled because he tripped over a small piece of government red tape—being late.

(16) More examples of the government appearing to boost its case came during the de la Torre-Garcia trial.

(17) In closing arguments, Kerr told the jury that de la Torre admitted to being the money man representing financial backers for drug smuggling.

(18) Kerr lied. De la Torre did not admit to that. An informant testified that de la Torre told him that.

(19) Kerr's job is to present the evidence and kept (*sic*) it straight or to straighten it if it's been confused by the defense. When the evidence is straight, it will speak for itself.

(20) More suspicious action: Weeks before the trial, the prosecution and defense shared evidence. There was a piece of paper with persons' names on it and their alleged code names to be used during the alleged smuggling operation. The piece of paper did not have Garcia's or de la Torre's name on it.

(21) A day and a half before the trial, the prosecution discovered it also had another list with all the same names as the first list plus, at the bottom, the names and codes for Garcia and de la Torre.

(22) Chagra said a day and a half was not enough time for him to have the second list analyzed by a handwriting expert to determine who wrote the list.

(23) In every case, the prosecution sounds off about its burden to prove guilt. The burden is no excuse for cheating.

(24) And the burden isn't that heavy to begin with.

(25) Chagra said to the jury, "In reality, when you read that someone is indicted, you sort of think he's guilty. Because usually where there's smoke there's fire. This courtroom is not a sterile environment" where people are perfectly objective and fair.

(26) It always seems amusing when Judge William Sessions or Judge John Wood tells a jury, after a prosecutor makes an irrelevant, nasty comment, to ignore that comment.

(27) It's hard to believe that the judge really believes the jury is a computer with an erase button . . . and that the words accidentally slipped off the lawyer's tongues.

(28) Here's what takes the cake: What kind of attitude does it suggest?—On the first day of the trial, Wood kept the jury until about 7 p.m.; on the second day, from 8;30 a.m. to about 7 p.m.; on the third day from 9 a.m. to 11 p.m.; and the last day from 7:30 a.m. until they reached a verdict at about 4:30 p.m.

(29) The unannounced reason for such long days for the jury, of which some members were at retirement age: so Judges Wood and Sessions could go fishing together.

APPENDIX B

RECORD REFERENCES

The following table reflects the breakdown of the opinion article of August 6, 1978, entitled "Federal System Less Than Just?", by paragraphs, Nos. 1 through 29, and then gives the Statement of Fact references and exhibit numbers wherein each paragraph is discussed and substantiated in the record of this case.

Paragraph Nos.	Statement of Fact References	Exhibit Nos.
1	95-96, 125-129, 157-158	Def. Exs. 2 and 3 (copies of *The El Paso Times* as it appeared on August 6, 1978)
2	149, 158-159, 475	Def. Ex. 7 (08/4/78 article)
3	96-98, 158-159	
4	98-101, 103, 145-146, 160-168, 229, 237, 410-413, 476-479	Def. Exs. 8 & 9 (Dusek's notes); Def. Exs. 10 & 11 (De la Torre Tr. pp. 1101 & 1107); Def. Ex. 12 (05/10/78 article) Def. Ex. 13 (04/21/78 article)
5-6	101-103, 167, 171-174, 413-415, 479-481	Def. Ex. 15, (Dusek's notes); Def. Ex. 16 (De la Torre Tr. pp. 1143-1145)
7	103-105, 481-485	
8	106-110, 174-176, 248-249, 415-419, 485, 537-538	
9	110, 157, 176-177	
10 & 11	157, 177-187, 188-192, 237-246, 249-253, 485-488	Def. Ex. 17 (01/13/78 article); Def. Ex. 18 (01/04/78 article); Def. Ex. 19 (02/01/78 article)
12-15	157, 192-195, 489-492	
16-19	68, 72-82, 88-91, 195-207, 230, 254-258, 400-406	Def. Ex. 23 (De la Torre Tr. p. 1092); Def. Ex. 24 (De la Torre Tr. p. 1095), Def. Ex. 25 (De la Torre Tr. p. 1131)
20-24	111-120, 207-213, 406-410, 492-496	Def. Ex. 20 (07/22/78 article) Def. Ex. 26 (Dusek's notes); Def. Ex. 27 (Dusek's notes)
25	213-215	Def. Ex. 28 (De la Torre Tr. p. 1114); Def. Ex. 29 (De la Torre Tr. p. 1115)
26 & 27	147-148, 215-216, 258-259	
28	147-150, 198, 216-217, 221-222, 539	
29	217, 259-270, 419-420, 539,541	